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No. 80-1233

In the Supreme Court

OF THE

United States

SYUFY ENTERPRISES,
Petitioner,

VS.

NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS AND LOCAL UNION NO. 241,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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I

COUNTER-STATEMENT OF THE CASE

Because Petitioner has omitted several critical facts regarding the circumstances under which this matter was arbitrated, it is necessary to set out a counter-statement of the facts of this case.

Syufy Enterprises was a member of a multi-employer collective bargaining unit and bound to a collective bargaining agreement with the Northern California State Association of I.A.T.S.E. Locals which expired August 15, 1976. In April of 1976, Syufy leased two of its theatres to David Norwitt. Simultaneously an Administration Agreement was executed between Syufy and Norwitt under which Syufy continued to operate the theatres. Mr. Nor-

witt became nothing more than an absentee lessee. There were no changes in conditions of employment of the union members at that time.

The multi-employer collective bargaining unit, the San Francisco Theatre Employers Association, commenced negotiations for a successor agreement. Although able to agree upon almost everything, the parties were unable to agree as to whether certain theatres including the two which are subject to this dispute were to continue to be covered by the collective bargaining agreement. As a result, the parties agreed to resolve this question outside the collective bargaining process:

> "The resolution of this coverage is being handled outside the scope of the negotiations, pursuant to current litigation and/or potential grievances, and it is agreed by this letter that neither party will claim that the inclusion or exclusion of these theatres from the list of theatres covered by the Master Agreement shall serve to prejudice either parties' position concerning their inclusion or exclusion."
>
> (R. 97 Letter to Employer Representative from Union Counsel dated December 28, 1976).[1]

As a result of this agreement, the collective bargaining agreement was consummated retroactive to August 15, 1976.[2]

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[1]"R" reflects the Record on appeal before the Ninth Circuit.

[2]The parties initially placed language in the collective bargaining agreement to the effect that application "of the contract to the following theatres is in dispute, and/or subject to litigation, the outcome of which will determine this issue." (R. 99). The parties, however, agreed to delete that language from the printed agreement and to leave it in the side letter referred to above.

Thereafter, a grievance was filed by the Unions asserting that Syufy violated the collective bargaining agreement by not applying it under the terms of its Administration Agreement with Norwitt. Simultaneously unfair labor practices were filed which were deferred pending resolution of the arbitration process under the Board's doctrine expressed in *Collyer Insulated Wire Co.* 192 N.L.R.B. 837 (1971).

Syufy and the Unions chose Armon Barsamian to arbitrate this dispute. At the hearing, the parties agreed to the issue as follows:

> "THE ARBITRATOR: 'The parties are prepared to stipulate to the following issues:
>
> '1. Whether or not the Arbitrator has jurisdiction over Norwitt and Cine 21 and Vallejo Auto Movies;
>
> '2. Whether or not Joint Exhibit No. 1 applies to Cine 21 and Vallejo Auto Movies; and if so, what shall be the remedy?
>
> 'So stipulated, Mr. Roger?
>
> 'THE ARBITRATOR: Mr. Holmes?
>
> 'MR. HOLMES: Yes.
>
> 'THE ARBITRATOR: Thank you.'"
>
> (R. 92).

The Arbitrator relied upon the issue as agreed to by the parties in order to frame the dispute which he was requested to decide. (Pet. App., p. 18).

After reviewing the evidence, the Arbitrator found that Syufy violated the collective bargaining agreement and that insofar as Syufy operated the theatres through the

lease and Administration Agreement it was bound to comply with the terms of the Agreement.

Syufy's Petition to Vacate the Arbitration Award was subsequently filed in state court and thereafter removed to the district court for the Northern District of California. These proceedings followed.

As we shall show, there is no issue warranting review by this Court since the Arbitrator was called upon to decide issues falling clearly within the scope of the grievance and arbitration procedure contained in the collective bargaining agreement governing "[a]ny dispute concerning any application or interpretation of this Agreement. . . ." (R. 35).

II

IN SEEKING REVIEW, SYUFY CHALLENGES NOT THE JURISDICTION OF THE ARBITRATOR BUT RATHER THE MERITS OF THE ARBITRATOR'S AWARD

On analysis it becomes clear that the only complaint lodged by Syufy is that the Arbitrator incorrectly determined that the contract applied to the two theatres in question. In reaching that decision, the Arbitrator relied upon the Administration Agreement by which Syufy had "full and complete management responsibilities . . . in [the disputed] theaters." (Pet. App., p. 31). The Arbitrator thereafter concluded that "the method and manner under which these theaters are being operated requires a conclusion that Syufy is the operator and must then operate in accordance with the Contract." (*id.* 32). Syufy complains because the names of the two theatres did not appear on the

list attached to the master collective bargaining agreement. As we, however, have noted, the Arbitrator relied upon the side agreement of the parties that the application of the agreement to those two theaters was to be subject to resolution through litigation or arbitration so as not to interfere with the consummation of the collective bargaining agreement.

In light of the well-established preference for arbitration as well as the very limited review of those arbitration decisions, there is no reason to disturb the Arbitrator's conclusions. More importantly, it cannot be said "with positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Navigation Co.* 363 U.S. 574, 582-583 (1960). Moreover, as this Court has said, the Courts should not become "entangled in the construction of the substantive provisions of the [labor agreement] . . . through the back-door of interpreting the arbitration clause." (*id.* 585). The court below properly fulfilled its obligation of determining whether a contract exists which includes grievance machinery which on its face covers the dispute and leaving the resolution of that dispute to the arbitration process. *Operating Engineers Local 150 v. Flair Builders, Inc.* 406 U.S. 487, 491 (1972).

Moreover, it is not unusual for parties to arbitrate the kind of dispute submitted to Arbitrator Barsamian. Questions of coverage of collective bargaining agreements are often resolved through similar processes. See, *e.g., Teamsters Local Unions v. Braswell Motor Freight Lines, Inc.* 392 F.2d 1, *mdf'd.,* 395 F.2d 655 (9th Cir. 1968).

That Syufy's petition is addressed to the merits of the Award can best be seen by its assertion that the Arbitrator improperly considered evidence from negotiations. As the court below properly pointed out this Court has expressly recognized that extrinsic evidence is often important to interpret various aspects of collective bargaining agreements. *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* 363 U.S. 582. See also Pet. App., p. 5-6 and *Certified Corporation v. Hawaii Teamsters & Allied Workers Local 996,* 597 F.2d 1269 (1979).

We submit, therefore, that there is no issue presented warranting review by this collateral attack upon the Arbitrator's Decision and Award.

III

THIS CASE DOES NOT PRESENT THE ISSUE WHICH PETITIONER ADVANCES AS REQUIRING RESOLUTION CONCERNING THE REVIEWABILITY OF ARBITRABILITY ISSUES

Petitioner points out, correctly, that the courts have used divergent language (largely in *dicta*) with respect to the function of courts in reviewing decisions of arbitrators after the losing party challenges the "arbitrability" of the dispute. We believe for a number of reasons that this issue is illusory in this case.

As we have pointed out above, the question of arbitrability in this case really amounts to a decision on the merits as to whether the two disputed theaters should be

covered by the agreement. It is not in any true sense a question of "arbitrability."[3]

Syufy voluntarily submitted this dispute *without raising* any question of arbitrability. As noted above, the parties to the 1976 negotiations expressly reserved this issue to resolution through arbitration or litigation. Syufy stipulated to the issues to be decided and did not raise the arbitrability objection to the Arbitrator. Rather, it asserted that the contract could not possibly cover the disputed theatres. Even those courts which have *de novo* reviewed an arbitrator's decision on "arbitrability" have insisted that some objection be raised to the arbitrability of the case before the arbitrator. See *International Brotherhood of Teamsters v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977); and *Local 719, American Bakery and Confectionary Workers v. The National Biscuit Company*, 378 F.2d 918, 922 (3rd Cir. 1967).

That Syufy considered the matter subject to arbitration is revealed in the Petition to Vacate, which does not allege the non-arbitrability of the dispute but alleges that the Arbitrator's Award exceeded his jurisdiction by being contrary to the clear language of the collective bargaining agreement:

> "The said award exceeded the authority or jurisdiction of the arbitrator and is subject to vacation under California Code of Civil Procedure § 1286.6 in that the said collective bargaining agreement, by its expressed terms, is limited to theatres which are named in it and an arbitrator has no jurisdiction or authority to

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[3]Since the Union did not proceed against Norwitt, the question of arbitrability as to that party does not exist.

> modify or amend the agreement by adding a theatre to those specified in it or to require petitioner to apply the agreement to lessee's employees." (R. 7).

Having characterized this matter from its start as a question of application of the agreement rather than arbitrability of the dispute, the issue posed by Petitioner to this Court does not exist.

Syufy complains because it relied upon state law to the effect that a party should submit to arbitration and challenge arbitrability later. See Petition for Writ of Certiorari, p. 17. As the district court noted in a subsequent Order denying Syufy's "Motion to Vacate the Court's Initial Decision", under California law a party is not compelled to submit to arbitration but rather may do so voluntarily. See *Freeman v. State Farm Mutual Auto Insurance Co.,* 14 Cal.3d 473, 480-481 (1975); and *McCarroll v. Los Angeles County Carpenters,* 49 Cal.2d 45, 65-66 (1957) and R. 141-142.

Finally, had Syufy legitimately contended that this dispute was not subject to resolution under the contractual grievance procedure, it should have resisted arbitration. The Union could have sought an order compelling arbitration under 29 U.S.C. § 185 and resolved this issue.

In summary, there is no legitimate question concerning the arbitrability of this dispute; the employer's complaint goes to the fact that it lost the case.

IV

THERE IS A SUBSTANTIAL QUESTION AS TO WHETHER THE DISTRICT COURT HAD JURISDICTION TO DO ANYTHING EXCEPT CONFIRM THE AWARD SINCE THE PETITION TO VACATE THE AWARD WAS FILED WELL MORE THAN 100 DAYS FROM SERVICE OF THE AWARD

Although this jurisdiction issue was not raised below, this Court must consider its jurisdiction *de novo*.

The Arbitrator's Award was served on August 11, 1977, on Syufy (R. 6:24-25). Although the pleadings do not reveal the date the Petition to Vacate was filed in state court, it could not have been filed before December 16, 1977, the date the pleadings were executed.

This Petition was untimely under either state or federal procedural rules, which require a petition to vacate to be filed within 100 days or three months, respectively. See 9 U.S.C. § 10 and *Chauffeurs, Teamsters Local Union No. 135 v. Jefferson Trucking, Inc.*, 628 F.2d 1023 (6th Cir. 1980), cert. den., ... U.S. ..... (1980); and California Code of Civil Procedure § 1288.2; and *Klubnikin v. California Fair Plan Association*, 84 Cal.App.3d 393 (1978).

It is true that Syufy requested the Arbitrator "to reconsider" his decision. There is no statutory authority for reconsideration and the Arbitrator's denial of that request did not serve to toll the time limit for filing a petition to vacate.

V

CONCLUSION

In summary, Syufy contests the Arbitrator's decision on its merits, not the arbitrability of the dispute. We submit that the Petition for Writ of Certiorari should be denied.

Dated: April 16, 1981

Respectfully submitted,

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